

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

MATCO TOOLS CORPORATION,

Petitioner,

v.

EMANUEL AGUILERA, ROCIO
AGUILERA, and SIMON GORO,

Respondents.

Case No. 5:19-cv-00641-PAB

RESPONDENTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Respondents, by and through undersigned counsel, hereby notify this Court of additional authority in support of Respondents' opposition to Claimant's petition to compel arbitration. As additional authority, Respondents call this Court's attention to the recent decision by the Honorable Anthony J. Battaglia, District Judge of the Southern District of California in *Aguilera et al. v. Matco Tools Corporation*, Case No. 3:19-cv-01576-AJB-AHG (S.D. Cal. Jan. 31, 2020) granting Respondents' Motion for a Temporary Restraining Order enjoining two arbitration actions brought by Claimant Matco against Respondents in Ohio predicated on the same purported arbitration and forum selection clauses at issue in this action¹. In reaching his decision, Judge Battaglia found that Matco is likely collaterally estopped from claiming it has a valid and enforceable arbitration agreement (pp. 7-9) and, independently, that the arbitration agreement Matco seeks to enforce here is likely unenforceable on its own terms (pp. 9-12.). A true and correct copy of Judge Battaglia's Temporary Restraining Order is attached to this notice as Attachment A.

DATED: February 4, 2020

Respectfully submitted:

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¹ The arbitration actions include: (1) *Matco Tools Corporation v. Aguilera*, American Arbitration Association ("AAA") Case No. 01-19-0002-0482; and (2) *Matco Tools Corporation v. Goro*, AAA Case No. 01-19-0002-0483.

Attachment A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EMANUEL AGUILERA, an
individual; ROCIO AGUILERA, an
individual; and SIMON GORO, an
individual,

Plaintiffs,

v.

MATCO TOOLS CORPORATION,
a Delaware corporation,

Defendant.

Case No.: 3:19-cv-01576-AJB-AHG
**ORDER GRANTING PLAINTIFFS
EMANUEL AGUILERA, ROCIO
AGUILERA, AND SIMON GORO'S
EX PARTE APPLICATION FOR
ISSUANCE OF TEMPORARY
RESTRAINING ORDER (Doc. No. 24)**

Currently pending before the Court is Plaintiffs Emanuel Aguilera, Rocio Aguilera, and Simon Goro's ("Plaintiffs") *ex parte* application for issuance of temporary restraining order ("TRO"), or in the alternative, for an order shortening time on Plaintiffs' motion for preliminary injunction. (Doc. No. 24.) Defendant Matco Tools Corporation ("Matco") opposed Plaintiffs' *ex parte* application, (Doc. No. 28) and Plaintiffs replied, (Doc. No. 29.) For the reasons set forth below, the Court **GRANTS** Plaintiffs' *ex parte* application for a TRO.

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1 **I. BACKGROUND**

2 This action can be distilled down to one simple dispute—whether this Court should
 3 enjoin Matco from proceeding with arbitration against Plaintiffs in Ohio.

4 **A. The Parties and Disputes**

5 Headquartered in Stow, Ohio, Matco Tools Corporation markets mechanic repair
 6 tools, diagnostic equipment, and toolboxes. (First Amended Complaint (“FAC”) ¶ 12.)
 7 Matco contracts with individual entrepreneurs, also known as “Distributors,” to display
 8 and sell Matco branded tools through “mobile distributorships.” (Doc. No. 28 at 12.) Matco
 9 requires all Distributors and their spouses to sign its “Distributorship Agreement” and pay
 10 a corresponding fee. (Doc. No. 24-1 at 6.)

11 Plaintiffs Emanuel Aguilera, his spouse, Rocio Aguilera, and Simon Goro are all
 12 residents of California. (FAC ¶ 10–12.) Plaintiffs and their spouses signed a Distributorship
 13 Agreement in June 2018. (Doc. No. 28 at 13.) Plaintiffs allegedly borrowed funds from
 14 Matco pursuant to a promissory note in connection with their franchise distributorships.
 15 (Id.) Plaintiffs then purchased tools from Matco, and sold the tools to customers. (Id.) Both
 16 Plaintiffs Emanuel Aguilera and Simon Goro operated distributorships solely in California
 17 until November 2018. (Id.)

18 Plaintiffs allege Matco refused to recognize the Distributors as employees, and
 19 deprived the Distributors of protections under California law such as overtime pay and
 20 reimbursement of business expenses. (Doc. No. 24-1 at 7.) Matco, on the other hand,
 21 contends the Distributors are independent contractors. (Doc. No. 28 at 13.)

22 However, before getting to the merits of the case, the parties currently dispute which
 23 forum, if any, the lawsuit should appropriately be filed in. Specifically, Plaintiffs and
 24 Matco clash over Matco’s Dispute Resolution provisions in the Distributorship
 25 Agreements, and the provisions requiring Distributors to submit to binding individual
 26 arbitration in Ohio for nearly all disputes. (Doc. No. 24-1 at 7.) While Matco contends
 27 otherwise, Plaintiffs allege the arbitration and forum selection clauses contained in their
 28 Distributorship Agreements are unenforceable. (Id.)

1 **B. Plaintiffs' Dismissed California Action and Matco's Petition to Compel**
 2 **Arbitration Pending in Ohio**

3 Previously on December 7, 2018, Plaintiffs filed a class action lawsuit on behalf of
 4 themselves and other Matco Distributors and their spouses in Alameda County Superior
 5 Court, alleging that they had been misclassified as "independent contractors." (Doc. No.
 6 24-1 at 7.) Matco removed the action to the United States District Court for the Northern
 7 District of California ("Northern District of California") on January 18, 2019. (Doc. No.
 8 28 at 15); *see Emanuel Aguilera et al. v. Matco Tools Corporation*, Case No.: 19-CV-
 9 00321-YGR (N.D. Cal. 2019). On March 11, 2019, Matco moved to dismiss or transfer the
 10 action to the United States District Court for the Northern District of Ohio ("Northern
 11 District of Ohio"). (*Id.*) Instead of opposing Matco's motion, Plaintiffs agreed to dismiss
 12 the case without prejudice, and the parties filed a request for dismissal on March 22, 2019.
 13 (*Id.* at 16.) Plaintiffs did not re-file their lawsuit. (Doc. No. 24-1 at 7.) On March 25, 2019,
 14 Matco then initiated an action against Plaintiffs in the Northern District of Ohio by filing a
 15 petition to compel arbitration of Plaintiffs' dismissed California claims. (*Id.* at 7); *Matco*
 16 *Tools Corporation v. Aguilera et al.*, Case No.: 19-cv-00641-PAB (N.D. Ohio 2019). The
 17 petition is fully briefed, and currently pending before the Northern District of Ohio. (*Id.*)

18 **C. Matco's Ohio Arbitrations Against Plaintiffs**

19 Then on June 28, 2019, Matco submitted an arbitration demand before the American
 20 Arbitration Association ("AAA") in Ohio against Plaintiffs Emanuel and Rocio Aguilera.
 21 (Doc. No. 28 at 16.) That same day, Matco filed a separate demand for arbitration—again
 22 before the AAA in Ohio—against Plaintiff Simon Goro and his wife. (*Id.*) In both
 23 arbitrations before the AAA, Matco seeks amounts relating to Plaintiffs' alleged failure to
 24 pay on their promissory notes. (Doc. No. 6 at 14.)

25 On September 19, 2019, Plaintiffs Emanuel and Rocio Aguilera contested the
 26 validity of the arbitration provision in their proceedings. (Doc. No. 30 at 16.) On December
 27 16, 2019, the arbitrator ruled that the provision was enforceable. (*Id.*) The evidentiary
 28 hearing in the arbitration is currently scheduled for March 25, 2020. (*Id.*)

1 Plaintiff Simon Goro and his wife are also challenging the arbitration provision in
2 their arbitration proceeding. (*Id.* at 17.) Their opening brief on the issue is due on February
3 7, 2020, and briefing will be complete on February 28, 2020. The arbitrator also scheduled
4 a status conference for March 6, 2020. (*Id.*)

5 **D. The *Fleming* Action: The Northern District of California and Ninth
6 Circuit Decisions**

7 Matco's classification of its workers as independent contractors is also being
8 challenged by a different plaintiff, John Fleming, in a putative class action filed on January
9 25, 2019 in the Northern District of California. *See John Fleming v. Matco Tools
10 Corporation, et al.*, No. 3:19-cv-00463-WHO, (N.D. Cal. Jan 25, 2019) (the “*Fleming
11 Action*”); (Doc. No. 24-1 at 7.) Plaintiffs in this instant matter are absent class members in
12 the *Fleming* Action. (Doc. No. 16 at 7.) And Plaintiff Rocio Aguilera does not meet the
13 criteria for putative class membership as defined in the *Fleming* complaint. (Doc. No. 17
14 at 15 n.4.) While John Fleming's Distributorship Agreement is not exactly the same as
15 Plaintiffs' in this instant action, the dispute resolution provisions in John Fleming's
16 Distributorship Agreement is not materially different to the provisions signed by Plaintiffs
17 here. (*Id.* at 10.) On February 19, 2019, in the *Fleming* Action, Matco moved to enforce
18 the Ohio forum selection clause in John Fleming's Distributorship Agreement by filing a
19 motion to dismiss, or, in the alternative, motion to transfer venue based on *forum non
20 conveniens*. (Doc. No. 28 at 15.) The district court denied the motion on May 3, 2019,
21 holding the arbitration and forum selection clauses in John Fleming's Distributorship
22 Agreement invalid. *See Fleming v. Matco Tools Corp.*, 384 F. Supp. 3d 1124 (N.D. Cal.
23 2019). Specifically, the district court held the Federal Arbitration Act (“FAA”) did not
24 preempt Cal. Bus. & Prof. Code § 20040.5, which bars non-California forum selection
25 clauses in franchise agreements. *Id.* at 1137. Additionally, the district court reasoned the
26 arbitration provision containing the forum selection clause was invalid because it contained
27 a Private Attorneys General Act (“PAGA”) waiver, which triggered a “blow up” provision
28 invalidating the arbitration provision. *Id.* at 1133.

1 On June 4, 2019, Matco filed a petition for writ of mandamus with the Ninth Circuit,
 2 on the issue of whether the district court properly determined the validity of the arbitration
 3 provision before ruling on the enforceability of the forum selection clause set forth in the
 4 arbitration provision. (Doc. No. 28 at 15.) On October 25, 2019, the Ninth Circuit denied
 5 the petition, affirming the district court’s decision. *In re Matco Tools Corp.*, 781 F. App’x
 6 681 (9th Cir. 2019). The Ninth Circuit held that the district court “did not err—much less
 7 clearly so—in considering the validity of the franchise agreement’s arbitration provision.”
 8 *Id.* at 682. The Ninth Circuit also held that the district court followed “binding Ninth Circuit
 9 precedent” in concluding that: (1) “Matco and Fleming did not agree to arbitrate their
 10 dispute under the plain terms of their contract,” (2) absent a valid arbitration provision, the
 11 FAA does not preempt Cal. Bus. & Prof. Code § 20040.5, and (3) the forum selection
 12 clause was unenforceable. (*Id.*) Matco filed a petition for rehearing en banc, which was
 13 denied by the Ninth Circuit on January 3, 2020. (Doc. No. 30 at 15.)

14 **II. PROCEDURAL HISTORY**

15 Plaintiffs filed this action in this Court on August 21, 2019. (Doc. No. 1.) A FAC
 16 was filed on August 22, 2019. (Doc. No. 3.) In the FAC, Plaintiffs assert three causes of
 17 action for: (1) declaratory judgment, holding the clauses requiring individual arbitration
 18 exclusively in Ohio void and unenforceable, (2) injunctive relief enjoining the Ohio
 19 proceedings, and (3) violation of California’s Unfair Competition Law. (Doc. No. 3.) On
 20 October 10, 2019, Matco filed a motion to dismiss for lack of jurisdiction and failure to
 21 state a claim. (Doc. No. 10.) Matco seeks dismissal based on (1) the first-to-file rule, (2)
 22 lack of jurisdiction because the Distributorship Agreement allegedly delegated issues of
 23 arbitrability to an arbitrator, and (3) the failure to state a claim on the UCL, restitution, and
 24 injunctive claims for relief. (Doc. No. 10.) Plaintiffs opposed the motion, (Doc. No. 16)
 25 and Matco replied, (Doc. No. 17). Hearing on Matco’s motion to dismiss is currently set
 26 for March 5, 2020.

27 Plaintiffs then filed a motion for preliminary injunction on December 27, 2019.
 28 (Doc. No. 18.) Matco opposed the motion. (Doc. No. 30). Plaintiffs’ reply is due January

1 31, 2020. Hearing on Plaintiffs' motion for preliminary injunction is currently set for
 2 March 5, 2020, the same date as hearing on Matco's motion to dismiss.

3 On January 13, 2020, after filing their motion for preliminary injunction, Plaintiffs
 4 filed an *ex parte* application for a temporary restraining order, or in the alternative, for an
 5 order shortening time on Plaintiffs' motion for preliminary injunction. (Doc. No. 24.)
 6 Matco opposed the *ex parte* application, (Doc. No. 28) and Plaintiffs replied, (Doc. No.
 7 29). This order follows.

8 **III. MATCO'S REQUEST FOR JUDICIAL NOTICE**

9 Matco seeks judicial notice of a statistical report from the federal court's website
 10 titled, "United States District Courts — National Judicial Caseload Profile." (Doc. No. 28-
 11 1.) Federal Rule of Evidence 201(b) permits judicial notice of a fact when it is "not subject
 12 to reasonable dispute because it: (1) is generally known within the trial court's territorial
 13 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy
 14 cannot reasonably be questioned." *Welk v. Beam Suntory Imp. Co.*, 124 F. Supp. 3d 1039,
 15 1041–42 (S.D. Cal. 2015). Plaintiffs have not opposed judicial notice of the report or
 16 otherwise disputed its authenticity. Accordingly, the Court grants judicial notice of the
 17 report because it is an undisputed "matter of public record." *See Lee v. City of Los Angeles*,
 18 250 F.3d 668, 689 (9th Cir. 2001).

19 **IV. LEGAL STANDARD**

20 A temporary restraining order may be granted upon a showing "that immediate and
 21 irreparable injury, loss, or damage will result to the movant before the adverse party can
 22 be heard in opposition[.]" Fed. R. Civ. P. 65(b)(1)(A). The purpose of such an order, as a
 23 form of preliminary injunctive relief, is to preserve the status quo and prevent irreparable
 24 harm "just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods,*
 25 *Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439
 26 (1974). A request for a TRO is evaluated by the same factors that generally apply to a
 27 preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d
 28 832, 839 n.7 (9th Cir. 2001). However, a TRO is an "extraordinary remedy" and is "never

1 awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)
 2 (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). Instead, the moving party bears the
 3 burden of demonstrating four factors: (1) “he is likely to succeed on the merits”; (2) “he is
 4 likely to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of
 5 equities tips in his favor”; and (4) “an injunction is in the public interest.” *Id.* at 20 (citations
 6 omitted). Additionally, under an alternative approach, an injunction may issue where there
 7 are “serious questions going to the merits” and “a balance of hardships that tips sharply
 8 towards the plaintiff.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
 9 Cir. 2011).

10 V. DISCUSSION

11 A. Likelihood of Success on the Merits

12 1. Collateral Estoppel

13 Plaintiffs argue Matco is collaterally estopped from enforcing the arbitration and
 14 forum selection clauses. (Doc. No. 24-1 at 15.) In particular, Plaintiffs contend Matco had
 15 the opportunity to litigate the issue of the enforceability of the arbitration and forum
 16 selection provisions in the *Fleming* Action. (*Id.*) Matco opposes, maintaining that collateral
 17 estoppel is a gateway issue for an arbitrator, the elements of collateral estoppel are not
 18 present, and its application would be unfair to Matco. (Doc. No. 28 at 22.) The Court
 19 disagrees with Matco.

20 To invoke nonmutual offensive issue preclusion, a plaintiff has to prove: (1) the
 21 defendant was afforded a full and fair opportunity to litigate the issues in the prior actions;
 22 (2) the issues were actually litigated and necessary to support the judgments; (3) the issues
 23 were decided against defendant in final judgments; and (4) defendant was a party or in
 24 privity with a party in the prior proceedings. *Resolution Tr. Corp. v. Keating*, 186 F.3d
 25 1110, 1114 (9th Cir. 1999).

26 Here, Plaintiffs’ collateral estoppel argument is likely to succeed. In running through
 27 the required elements for issue preclusion, Plaintiffs have a compelling argument that
 28 collateral estoppel would apply. First, it appears Matco was provided a full and fair

1 opportunity to litigate the issue of the arbitration provisions in the *Fleming* Action because
 2 Matco filed a motion to dismiss, or in the alternative, to transfer venue to enforce virtually
 3 identical arbitration provisions as in this instant matter. (*Fleming* Action, No. 3:19-cv-
 4 00463-WHO, Doc. No. 16.) Matco then went on to challenge the district court's denial of
 5 its motion through a petition for writ of mandamus, which resulted in a Ninth Circuit
 6 decision holding the arbitration and forum selection clauses unenforceable. *In re Matco*
 7 *Tools Corp.*, 781 F. App'x at 682. Matco even filed a petition for rehearing en banc, which
 8 was denied by the Ninth Circuit on January 3, 2020. (*Fleming* Action, No. 3:19-cv-00463-
 9 WHO, Doc. No. 43.) And lastly, there is no indication that Matco petitioned for a writ of
 10 certiorari from the United States Supreme Court.

11 Second, the issue of the enforceability of the arbitration provisions was actually
 12 litigated as the *Fleming* district court found it necessary to evaluate the arbitration clause
 13 before ruling on Matco's forum selection clause. *See Fleming*, 384 F. Supp. 3d at 1137
 14 ("Matco's motion to dismiss is denied because by the Distribution Agreement's own terms,
 15 the arbitration provision is invalid and Section 20040.5's prohibition of forum selection
 16 clauses in franchise agreements restricting venue to a forum outside California is not
 17 preempted by the FAA."). The district court's ruling was subsequently affirmed by the
 18 Ninth Circuit. *In re Matco Tools Corp.*, 781 F. App'x at 682.

19 Third, there is support that the Ninth Circuit's denial of Matco's petition for writ of
 20 mandamus was a "final judgment." In general, a prior decision will have res judicata effect
 21 only if it was a decision "on the merits." *Lawlor v. National Screen Service Corp.*, 349
 22 U.S. 322, 326 (1955). A prior denial of a petition for a writ of mandamus will have res
 23 judicata effect only if the denial was "on the merits," but not if the denial was the result of
 24 the special limitations inherent in the writ. *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074,
 25 1078 (9th Cir. 1988); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 558 (6th Cir. 1976)
 26 ("A proceeding upon a petition for a writ of mandamus is a separate action. . . . Therefore,
 27 the Seventh Circuit's order was not interlocutory, but a final disposition, challengeable
 28 only by writ of certiorari in the Supreme Court, which [plaintiff] did not seek."). Thus, the

1 question becomes whether the Ninth Circuit’s denial of the petition for a writ of mandamus
 2 was “on the merits.” The Court concludes it was. Here, the Ninth Circuit specifically stated
 3 “[t]he district court did not err—much less clearly so—in considering the validity of the
 4 franchise agreement’s arbitration provision in the course of deciding Matco’s motion.” *In*
 5 *re Matco Tools Corp.*, 781 F. App’x at 682. Furthermore, the Ninth Circuit also held “the
 6 district court followed binding Ninth Circuit precedent in concluding” that there was no
 7 agreement to arbitrate or a valid forum selection clause. *Id.*

8 And lastly, it is undisputed that Matco was a defendant in the *Fleming* Action.
 9 Additionally, counsel of record in this instant action was also the same counsel of record
 10 as in the *Fleming* Action. (Doc. No. 24-1 at 16.)

11 In opposing Plaintiffs’ collateral estoppel argument, Matco argues that collateral
 12 estoppel is a question for an arbitrator. (Doc. No. 28 at 22.) It is true that “issues of
 13 procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches,
 14 estoppel, and other conditions precedent to an obligation to arbitrate have been met are for
 15 the arbitrators to decide.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002).
 16 But Matco oversimplifies the matter. This situation is not one in which an arbitrable issue
 17 within the scope of the arbitration provision is potentially subject to collateral estoppel.
 18 Instead, collateral estoppel potentially applies to the issue of the validity of an arbitration
 19 clause, which as explained below, is an issue for courts to decide. *See also Prima Paint*
 20 *Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). Matco cites no authority
 21 to suggest the contrary.

22 In sum, the Court concludes there is a probable likelihood of success on the merits
 23 on Plaintiffs’ collateral estoppel argument.

24 **2. The Unenforceability of the Arbitration Provision**

25 Even if collateral estoppel were not to apply, the Court also holds that the arbitration
 26 provision in Plaintiffs’ Distributorship Agreement is likely unenforceable due to its
 27 inclusion of a Private Attorneys General Act (“PAGA”) claim waiver. PAGA “authorizes
 28 an employee to bring an action for civil penalties on behalf of the state against his or her

1 employer for Labor Code violations committed against the employee and fellow
 2 employees, with most of the proceeds of that litigation going to the state.” *Sakkab v.*
 3 *Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 429 (9th Cir. 2015).

4 The PAGA waiver in Plaintiffs’ Distributorship Agreement reads, “THE
 5 DISTRIBUTOR EXPRESSLY WAIVES ANY RIGHT TO ARBITRATE OR LITIGATE
 6 AS A CLASS ACTION OR **IN A PRIVATE ATTORNEY GENERAL CAPACITY.**” (See
 7 Doc. No. 24-3, Ex. A ¶ 12.7 (emphasis added).) Also included in the Distributorship
 8 Agreement is a “blow-up provision” that provides, “if the provision prohibiting classwide
 9 or **private attorney general arbitration is deemed invalid, then the provision requiring**
 10 **arbitration of breaches between the parties shall be null and void** and there shall be no
 11 obligation to arbitrate such breaches.” (*Id.* ¶ 12.12 (emphasis added).)

12 It is well-established in the Ninth Circuit that provisions purporting to waive PAGA
 13 claims are unenforceable in arbitration agreements. Indeed, in *Sakkab*, the Ninth Circuit
 14 held that pre-dispute agreements to waive PAGA claims are unenforceable because: (1)
 15 agreements exculpating a party for violations of the law are unenforceable; and (2) a law
 16 established for a public reason may not be contravened by private agreement. *Sakkab*, 803
 17 F.3d at 429. It is quite clear that the arbitration provisions in Plaintiffs’ Distributorship
 18 Agreement contain improper PAGA waivers. Thus, under settled Ninth Circuit law, the
 19 PAGA waiver constitutes an impermissible pre-dispute agreement to waive PAGA claims.
 20 This invalid PAGA waiver, read in conjunction with the “blow-up provision” renders the
 21 arbitration agreement likely unenforceable.

22 3. The Invalid Forum Selection Clause

23 Also likely invalid is the forum selection clause. The forum selection clause in
 24 Plaintiffs’ agreement states, “[u]nless this requirement is prohibited by law, all arbitration
 25 hearings must and will take place exclusively in Summit or Cuyahoga County, Ohio. All
 26 court actions, mediations or other hearings or proceedings initiated by either party against
 27 the other party must and will be venued exclusively in Summit or Cuyahoga County,
 28 Ohio.” (See Doc. No. 24-3, Ex. A ¶ 12.10.)

1 California Business and Professions Code § 20040.5 makes void any “provision in
 2 a franchise agreement restricting venue to a forum outside this state . . . with respect to any
 3 claim arising under or relating to a franchise agreement involving a franchise business
 4 operating within this state.” Cal. Bus. & Prof. Code § 20040.5. The Ninth Circuit has held
 5 that the statute “expresses a strong public policy of the State of California to protect
 6 California franchisees from the expense, inconvenience, and possible prejudice of litigating
 7 in a non-California venue.” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir.
 8 2000). A forum selection clause “that requires a California franchisee to resolve claims
 9 related to the franchise agreement in a non-California court[,]” such as the one here,
 10 “directly contravenes this strong public policy and is unenforceable under the directives of
 11 *Bremen*.” *Id.* (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 (1972)).

12 Here, Matco does not dispute that it styled its agreements with Distributors as
 13 franchise agreements. The Ninth Circuit in the *Fleming* Action explicitly determined that
 14 “applying section 20040.5, the forum-selection clause here is unenforceable because it
 15 would require Fleming, a California franchisee, to litigate in a non-California venue.” *In*
 16 *re Matco Tools Corp.*, 781 F. App’x at 683. The Court finds no reason to diverge from the
 17 Ninth Circuit’s reasoning, given that the forum selection clause in Fleming’s
 18 Distributorship Agreement does not materially differ from Plaintiffs’ here. Thus, given the
 19 mandate of Cal. Bus. & Prof. Code § 20040.5, the Court holds that there is a likelihood of
 20 success in invalidating the forum selection clause.

21 4. **The Delegation Clause**

22 Matco further argues that the Distributorship Agreements delegate gateway
 23 questions of arbitrability to an arbitrator. (Doc. No. 28 at 20.) The purported delegation
 24 clause in the Plaintiffs’ Distributorship Agreements states: all “disputes and controversies
 25 . . . arising from or related to this Agreement . . . will be determined exclusively by binding
 26 arbitration.” (Doc. No. 28 at 20.)

27 Courts have held that if the validity of the agreement to arbitrate is in issue, a district
 28 court—and not a panel of arbitrators—must decide if the arbitration clause is enforceable

1 against the parties. *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395,
 2 403–04 (1967) (holding that if the making of the arbitration agreement is an issue “the
 3 federal court may proceed to adjudicate it”). That is precisely the case here as Plaintiffs
 4 argue the arbitration provisions are unenforceable, and also additionally contend the
 5 provisions are procedurally and substantively unconscionable.

6 In addition, a delegation clause is only enforceable “when it manifests a clear and
 7 unmistakable agreement to arbitrate arbitrability, and is not invalid as a matter of contract
 8 law.” *Oliver v. First Century Bank, N.A.*, No. 17-CV-620-MMA (KSC), 2017 WL
 9 5495092, at *2 (S.D. Cal. Nov. 16, 2017). Given the generalized language of the alleged
 10 delegation clause, the Court finds no such “clear and unmistakable” agreement to delegate.
 11 Notably missing from this alleged delegation clause is any language delegating questions
 12 of “interpretation, applicability, enforceability or formation” to an arbitrator. *Cf. Armenta*
 13 *v. Go-Staff, Inc.*, No. 16-CV-2548 JLS (AGS), 2017 WL 1711293, at *1 (S.D. Cal. May 3,
 14 2017) (granting motion to compel arbitration where delegation clause stated “[t]he
 15 arbitrator shall have exclusive authority to resolve any dispute relating to the interpretation,
 16 applicability, enforceability, or formation of this Agreement, including, but not limited to,
 17 any claim that all or any part of this Agreement is void or voidable.”). As such, the
 18 questions of arbitrability should not be delegated to an arbitrator.

19 B. Irreparable Harm in The Absence of a TRO

20 A plaintiff seeking a TRO must establish a likelihood of irreparable harm in the
 21 absence of relief. *Herb Reed Enterprises, LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d
 22 1239, 1242 (9th Cir. 2013). “Those seeking injunctive relief must proffer evidence
 23 sufficient to establish a likelihood of irreparable harm.” *Id.* at 21. A court may not rely on
 24 “unsupported and conclusory statements regarding harm [a plaintiff] *might* suffer.” *Id.* at
 25 19 (internal quotation marks omitted; emphasis in the original). Without the issuance of a
 26 TRO, Plaintiffs will suffer irreparable injury and abridgement of their rights and remedies
 27 under California law if forced to litigate actions in an improper forum. *See World Grp. Sec.*
 28 *v. Tiu*, No. CV 03-2609 NM SHSX, 2003 WL 26119461, at *7 (C.D. Cal. July 22, 2003)

1 (“[F]orcing Plaintiff to arbitrate would deprive it of its right to choose a forum and result
 2 in simultaneous litigation of this dispute in two forums, causing Plaintiff to expend time
 3 and incur additional legal expenses for which it has no adequate remedy at law.”).
 4 Therefore, this factor weighs in favor of Plaintiffs.

5 **C. Balance of Hardships**

6 Before issuing a TRO, courts must weigh “the competing claims of injury and []
 7 consider the effect on each party of the granting or withholding of the requested relief.”
 8 *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987). The balance of
 9 equities tips sharply in favor of Plaintiffs as California residents. Indeed, all of Plaintiffs’
 10 work for Matco was performed in California. (Doc. No. 24-23 at ¶ 5; Doc. No. 24-26 at ¶
 11 5.) Plaintiffs have resided in California for their entire adult lives. (Doc. No. 24-23 at ¶ 4;
 12 Doc. No. 24-26 at ¶ 4.) And outside of traveling to Ohio for approximately ten days to
 13 receive training from Matco, Plaintiffs have never traveled to Ohio, and never intend to
 14 return to Ohio. (Doc. No. 24-23 at ¶ 5; Doc. No. 24-26 at ¶ 5.) Matco, on the other hand,
 15 does not explain why it would be harmed if its arbitration proceedings against Plaintiffs in
 16 its home state were temporarily enjoined. Furthermore, the Court agrees with Plaintiffs that
 17 a TRO would not divest Matco of its rights to pursue its claims in a proper forum. (Doc.
 18 No. 24-1 at 29.) Accordingly, this factor weighs heavily in favor of Plaintiffs as well.

19 **D. Public Interest**

20 “The public interest analysis for the issuance of a [TRO] requires [district courts] to
 21 consider whether there exists some critical public interest that would be injured by the grant
 22 of preliminary relief.” *Cottrell*, 632 F.3d at 1138 (citation omitted). An issuance of a TRO
 23 based on these facts is not in contravention of the public’s interest. Rather, it furthers the
 24 public’s interest in ensuring California franchisees are not burdened with the “expense,
 25 inconvenience, and possible prejudice of litigating in a non-California venue.” *Jones*, 211
 26 F.3d at 498. Additionally, injunctive relief also furthers the public’s interest in ensuring
 27 that parties are not forced to arbitrate under invalid arbitration provisions. As such, this
 28 factor too weighs in favor of a TRO.

1 **VI. CONCLUSION**

2 In light of the foregoing, the Court **GRANTS** Plaintiffs' *ex parte* application for
3 TRO. Defendant Matco Tools Corporation is temporarily **ENJOINED** from arbitrating its
4 claims against Plaintiffs in the arbitration proceedings in Ohio. This TRO does not affect
5 the parties' proceeding before the Northern District of Ohio. The hearing on Plaintiffs'
6 motion for preliminary injunction and Matco's motion to dismiss remains on calendar for
7 **March 5, 2020**. However, the time for the hearing will be continued from **2:00 PM to 4:30**
8 **PM.**

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10 **IT IS SO ORDERED.**

11 Dated: January 31, 2020

12 
13 Hon. Anthony J. Battaglia
United States District Judge

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